1889

BOISTUB CHURN NAUN v. WOOMA CHURN SEN.

Several cases decided in the Indian Courts have been cited, but they do not throw a very strong light upon this case. They related not to contracts of sale but contracts of a different character. The result is that, in my opinion, we ought to answer the fourth question referred to us in the affirmative, and as that disposes of the whole case, it is unnecessary to answer any of the others.

Attorney for the plaintiffs: Baboo *Kali Nath Mitter.*

Attorney for the defendant: Baboo *B. N. Bose.*

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Tottenham.

1889 *March* 21.

NILMONY PODDAR AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT.)*

Sentence—Separate sentences for rioting and grievous hurt—Penal Code, ss. 71, *para.* 1, 144, 147, 148, 324—*Act VIII of* 1882—*Criminal Procedure Code* (*Act X of* 1882), *s.* 35.

Per Curiam (TOTTENHAM, J., dissenting).—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress* v. *Ram Partab* (1), approved; *Loke Nath Sarkar* v. *Queen-Empress* (2), overruled.

REFERENCE to a Full Bench made by Mr. Justice Mitter and Mr. Justice Macpherson under the following order:—

The question reserved by us in this case is, whether separate sentences passed upon the appellants Nos. 1, 3, 4, and 5 for offences of rioting and hurt are legal.

The finding of the lower Court which we have upheld is that these appellants, who are guilty of rioting, did not individually commit any acts which amounted to voluntarily causing hurt;

* Full Bench on Criminal Appeal No. 78 of 1889, against the judgment of Mr. B. L. Gupta, Officiating Sessions Judge of Farridpore, dated the 8th December 1888.

(1) I. L. R., 6 All., 121.

but they are guilty of that offence, because their co-appellants, Charan and Nobin, with whom they were associated as members of an unlawful assembly, committed certain acts which amounted to voluntarily causing hurt in prosecution of the common object of that assembly. The appellants Nos. 1, 3, 4, and 5 were, therefore, found guilty of the offence of hurt under s. 149 of the Indian Penal Code.

In appeal No. 38 of this year this question arose, and following *Empress* v. *Ram Partab* (1) we held that separate sentences for the two offences are not legal. At that time we were not aware that in *Empress* v. *Loke Nath Sarkar* (2) the contrary view was taken.

We, therefore, refer the following question to a Full Bench: whether separate sentences passed upon appellants 1, 3, 4, and 5 for offences of rioting and hurt are legal, it being found that they individually did not commit any act which amounted to voluntarily causing hurt, but are guilty of that offence under s. 149 of the Indian Penal Code.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.—In the prosecution of the common object of the unlawful assembly, which was to take possession of certain lands, several huts were broken down; one man, Bhagidhar, was badly beaten by one of the rioters not under trial, and by other rioters not identified. Another man, Miajan, was wounded with a spear by one of the accused, and with a lathi by another accused. Force and violence having been used in pulling down the huts and in beating Bhagidhar, the accused have all been found guilty of rioting and sentenced to the full punishment awardable; and the two men who wounded Miajan have also been separately punished for causing hurt to him, but the four other accused, not having individually caused hurt to any one, the question whether they may be separately punished for the hurt has been referred to the Full Bench. It is conceded that all the prisoners were punishable for rioting, and that two of them were separately punishable for the hurt they caused in prosecution of the common object of the riot. If these two, as is conceded, were guilty of an offence punishable separately for the punishment awarded for the riot, all the others are, it is submitted, also punishable in a like manner; for

(1) I. L. R., 6 All., 121. (2) I. L. R., 11 Calc., 349.

1889

NILMONY PODDAR v. QUEEN-EMPRESS.

by s. 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of a common object, every member is guilty of that offence. If the offence is separable in the one case, it is a separable offence in the other. Section 71 of the Penal Code does not apply to a case of this nature. Illustration (*a*) to that section shows what was in contemplation by the words "an offence made up of parts." This refers to one offence, in regard to which there can, in the nature of things, be only one trial; as where hurt is caused by several blows with a stick, the several blows make out one offence, and could only be tried and be punishable as one offence. The second illustration applies to the present case. The hurt inflicted on Bhagidhar is no part of the offence against Miajan. Each might have insisted on a separate trial, and although the facts in evidence in the two cases, *viz.*, that the accused took part in the riot, but could not be identified as having struck any particular blow, might be the same, the offences for which they were responsible as rioters would be separate and distinct, and they would be equally responsible to Miajan as to Bhagidhar. Section 35 of the Criminal Procedure Code, which relates to convictions for separate and distinct offences at one trial, governs this case and not s. 71 of the Penal Code.

Rioting is an offence against the public tranquillity, and is dealt with in a different chapter of the Penal Code from offences affecting the human body. Examples of "more offences than one" are given in illustrations (*a*) to (*h*). In s. 235 of the Criminal Procedure Code, illustration (*g*) shows that the offences of rioting and hurt are separate. If they are separate offences, s. 71 of the Penal Code cannot apply to them. The illustration given in *Empress* v. *Ram Partab* (1), as applicable to the first part of s. 71, is not appropriate to that part, but comes under part 3 of that section. A person cannot be punished both for being a member of an unlawful assembly and for riot, because, when force is superadded to the first, it becomes the second, and the combination of unlawful assembly and force constitute a different offence. The illustration regarding the man who holds up his fist, then strikes, and then stabs, is of the same character as the several blows in one beating are one offence; but the causing of grievous hurt to three

(1) I. L. R. 6 All., 121, on p. 124, line 26.

people, which were the facts found in that case, did not culminate in the riot for which the accused was punished. If the riot, on the other hand, culminates in murder, or, as in the above case, in grievous hurt, the rioters become liable, it is submitted, for those separate offences under s. 149. The other cases against my contention followed and accepted the arguments in the above case. They are, however, dissented from in *Queen-Empress* v. *Dungar Singh* (1); *Loke Nath Sarkar* v. *Queen-Empress* (2); *Queen-Empress* v. *Pershad* (3); *Queen-Empress* v. *Sakharam Bhau* (4); *Queen-Empress* v. *Nirichan* (5).

No one appeared for the prisoner.

The following opinions were delivered by the Court (PETHERAM, C.J., MITTER, PRINSEP, WILSON, and TOTTENHAM, JJ.):—

PETHERAM, C.J., MITTER, PRINSEP and WILSON, JJ.—We are of opinion that the questions referred in this case should be answered in the negative.

The appellants Nos. 1, 3, 4 and 5 were found guilty of rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code, and each of them was sentenced to three years' rigorous imprisonment for that offence. Two of their co-appellants, whose appeals are not before us, are found to have committed, in prosecution of the common object of the unlawful assembly of which they were all members, acts which amounted to voluntarily causing hurt under s. 324 of the Indian Penal Code. The appellants Nos. 1, 3, 4 and 5 were, therefore, also found guilty of voluntarily causing hurt under s. 324 of the Indian Penal Code, coupled with s. 149 of the Indian Penal Code. For this offence each of them was sentenced to a further period of rigorous imprisonment for one year. We think that under the first paragraph of s. 71 of the Indian Penal Code these separate sentences are not legal.

Paragraph 1 of s. 71 of the Indian Penal Code is to the following effect:—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided."

(1) I. L. R., 7 All., 29.
(2) I. L. R., 11 Calc., 349.
(3) I. L. R., 7 All., 414.
(4) I. L. R., 10 Bom., 496.
(5) I. L. R., 12 Mad., 36.

1889

NILMONY PODDAR v. QUEEN-EMPRESS.

In this case the offence of voluntarily causing hurt under s. 324, coupled with s. 149 of the Indian Penal Code, of which these appellants have been found guilty, is primarily made up of two parts, *viz.* : (1) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, *viz.*, rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of s. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it.

The following cases were cited before us: *Empress* v. *Ram Partab* (1); *Loke Nath Sarkar* v. *Queen-Empress* (2); *Queen-Empress* v. *Dungar Singh* (3); *Queen-Empress* v. *Pershad* (4); *Queen-Empress* v. *Ram Sarup* (5); *Queen-Empress* v. *Sakharam Bhau* (6); *Queen-Empress* v. *Nirichan* (7).

With the exception of the first two, the other cases do not appear to us to be any authority upon the question under our consideration. In some of the Allahabad cases Mr. Justice Brodhurst expressed his opinion upon it; but we do not find that this question legitimately arose in them.

For the reasons set forth above, we agree with the view expressed by Mr. Justice Straight in *Empress* v. *Ram Partab* (1).

The result is that the sentence of one year's rigorous imprisonment passed upon each of the appellants Nos. 1, 3, 4 and 5, under s. 324, coupled with s. 149 of the Indian Penal Code, will be set aside.

(1) I. L. R., 6 All., 121.
(2) I. L. R., 11 Calc., 349.
(3) I. L. R., 7 All, 29.
(4) I. L. R., 7 All., 414.
(5) I. L. R., 7 All., 757.
(6) I. L. R., 10 Bom., 496.
(7) I. L. R., 12 Mad., 36.

1889

NILMONY PODDAR v. QUEEN-EMPRESS.

TOTTENHAM, J.—In my opinion the separate sentences passed upon the appellants Nos. 1, 3, 4 and 5 for offences under ss. 148 and 324 of the Penal Code are legal. The legality of the convictions is not in dispute before us, and it seems to me that the prisoners are each liable under s. 35 of the Code of Criminal Procedure to receive sentences in respect of each of these offences, unless s. 71 of the Penal Code protects them from being punished for each offence.

Section 71, as amended by Act VIII of 1882, provides for three cases in which the offender shall not be liable to be punished for more than one of two or more offences of which he may have been convicted.

The first clause of that section is the only one that need be considered in this case; for that is the one, if any, which may be applicable to this case.

The first clause then is in these words: "When anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

The prisoners have been convicted of offences punishable under ss. 148 and 324 of the Penal Code. It is true that the offence punishable under s. 148 is made up of parts, either of which parts is itself an offence, *viz.*, being a member of an unlawful assembly, armed with a deadly weapon (s. 144), and rioting (s. 147); but s 148 expressly provides a higher punishment than could be awarded for either of those two offences.

The offence under s. 324, of which also the prisoners have been convicted, is not necessarily made up of parts, any of which parts is itself an offence: so that s. 71 does not very clearly affect the liability of the prisoners to be separately sentenced for each offence.

But an opinion has been expressed that, because the conviction of the prisoners of the offence punishable by s. 324 is justified only by the provisions of s. 149, therefore that offence is in this case made up of parts, any of which parts is itself an offence, the parts being offences under ss. 143 to 147 and 148 by the

1889

NILMONY PODDAR v. QUEEN-EMPRESS.

prisoners themselves, and an offence under s. 324 committed by another person.

I am unable to adopt this view. I could perhaps do so if s. 149 defined and made punishable any specific offence; but it does not do this. It simply declares that under certain circumstances every person, who is a member of an unlawful assembly, is guilty of the offence committed by some other member of it, whatever that offence may be; and, if he is guilty, I apprehend he is liable to be punished for it.

He is not convicted of an offence punishable under s. 149, but of an offence punishable under whatever section such offence is made punishable. Section 149 simply makes the participators in an unlawful assembly equally liable with the actual perpetrator for any offence committed by him in prosecution of the common object.

The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits; and if such further offence is committed in prosecution of the common object of the rioters, s. 149 declares that each one of these is guilty, notwithstanding that he did not do the act or abet it. It places each member of the unlawful assembly in the same position as the actual perpetrator of the further offence. This seems to me to be the plain meaning of the law, and I cannot agree in holding that the offence punishable under s. 324 is made up of several parts upon the ground that it is s. 149 which declares the guilt of the prisoners.

I think the sentences passed are legal.

T. A. P. *Sentence varied.*

C.